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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 378

ROBERT E. HOWARD,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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ROBERT E. HOWARD,
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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered in the above-entitled cause on May 11, 1965, and its order denying petitioner's Petition For Rehearing, entered on June 24, 1965.

CITATION TO OPINION BELOW

There was no opinion in the trial court, the United States District Court for the District of Massachusetts, and the opinion of the United States Court of Appeals for the First

Circuit has not as yet been reported but is set out in Appendix A hereto, ps. 16-21, *infra*.

JURISDICTION

On June 24, 1965 the United States Court of Appeals for the First Circuit entered an order denying petitioner's Petition For Rehearing pertaining to its judgment of May 11, 1965 (R. 139).[1] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Rule 22 (2).

QUESTIONS PRESENTED[2]

1. Did the court below misinterpret 41 U.S.C. §§ 51, 54 in affirming the conviction of an employee of a Government contractor just for receiving a so-called "kickback"—holding that neither his intent to procure a subcontract nor his being in a position to do so were elements of the crime?

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[1] Citations to the Record (R.) are to the one certified copy of the proceedings below, which includes the Record-Appendix filed in the court below. Nine extra copies of that Record-Appendix have been provided herewith, the pagination is the same as in the proceedings below, and most subsequent record references are encompassed within the Record-Appendix.

[2] If certiorari is granted, petitioner intends to present the following additional questions in his brief on the merits, which were argued below, involving an important area of conflict between Circuits, but they do not seem sufficiently important or material to be urged as grounds for the issuance of the writ and will not be argued herein:

a. Is the so-called "circumstantial evidence test" still good law after *Holland* v. *United States*, 348 U.S. 121 (1954), and if so, did the court below properly apply it?

b. Should the indictment have been dismissed for failing to state a crime on the authority of *United States* v. *Dobar*, 223 F. Supp. 8 (M.D. Fla. 1963), a conflicting result recently noted in *Moore* v. *United States*, ___ F.2d ___ (9th Cir. 1965), No. 19, 435, June 25, 1965?

c. Was the petitioner misled by the trial judge as to the contents of his charge to the extent that he was denied a fair trial?

2. If the lower court's interpretation of 41 U.S.C. §§ 51, 54 was correct, is the statute unconstitutional for shifting the burden of proof to a criminal defendant?

PROVISIONS INVOLVED

The Federal "Anti-Kickback Statute," so-called, 60 Stat. 37, 38 (1946), 41 U.S.C. §§ 51, 54,[3] the federal bribery statute, 76 Stat. 1119 (1962), 18 U.S.C. § 201, and the Fifth Amendment to the Constitution of the United States are the only relevant provisions, and, in accordance with Rule 23 (I)(d) they are set out verbatim in Appendix B hereto, ps. 22-27, *infra*.

STATEMENT OF THE CASE

The facts are clear. The evidence is uncontradicted, and petitioner will admit several key facts. First the relevant procedural matters will be summarized and then the substantive facts.

Proceedings Below

On April 4, 1963 petitioner was indicted together with Bernard J. Champy, Superintendent of the Champy Construction Company for receiving "kickbacks" in violation of 41 U.S.C. §§ 51, 54 in the United States District Court for the District of Massachusetts (R. 1, 3-5). On March 6, 1964 both defendants were found guilty by a jury (R. 2). Petitioner was sentenced to six months imprisonment by Caffrey, J. on March 23, 1964 from which he appealed (R. 2-3). The United States Court of Appeals for the First Circuit affirmed the conviction by judgment entered on May

[3] Note that the statute as technically amended September 2, 1960, Pub. L. 86-695, 74 Stat. 741, is not here relevant.

11, 1965 (R. 135) and denied a Petition For Rehearing by an order dated June 24, 1965 (R. 139). Mandate was stayed June 29, 1965 pending this Court's decision on the instant petition (R. 139).

The Facts

Between the relevant indictment dates of June 19 to October 20, 1958 (R. 3-5) petitioner was assistant plant engineer of the Andover, Massachusetts plant of Raytheon Manufacturing Company where it was producing or preparing to produce Hawk missiles under a cost reimbursable contract with the United States (R. 74-75, 125). Petitioner's co-defendant under the indictment, Champy, was a subcontractor for Raytheon under the prime contract (R. 43, 125-126) and furnished petitioner with $4,564.04 worth of labor and materials between June 19 and October 20, 1958 on a home petitioner was building in Andover (R. 13-19, 99-104). Bills were sent for the work (R. 13-19) but were never paid (R. 103), and other than sending bills to petitioner for payment, no other attempt was made by Champy to collect the amount owing from petitioner until 1962 (R. 100-101).

Petitioner's gross salary was $625 a month until October 1, 1958 when it was increased to $725 a month (R. 75), and he obtained a $20,000 mortgage construction loan on the house (R. 94-95). No evidence was introduced of the value of the house or any other labor and materials put into it, nor was any other evidence introduced pertaining to petitioner's net worth or financial status.

Although it is unknown when Champy qualified and was placed on the relevant bidders list, he received awards of subcontracts from Raytheon under the prime contract in dollar amounts surpassing $100,000 in every year from 1958 through 1963, the last complete year at the time of trial (R.

57, 62). Petitioner resigned from Raytheon on November 30, 1960 (R. 75). At all times Champy performed his subcontracts with no complaint or difficulty and did satisfactory work (R. 90). It is unknown what percentage of the work was won by Champy's low bids or the total money value of the subcontracts awarded in that field.

The trial evidence was mainly concerned with picturing the complicated system of checks, reviews and rechecks by which Raytheon received bids and awarded subcontracts under this prime contract and the part petitioner Howard played in that system. The essential outline of the system will here suffice.

The prime contract incorporated by reference the detailed Army procedures for bidding on and awarding subcontracts (R. 29) and Raytheon had in effect further specific and consistent regulations of its own (R. 54). A bidders list would be made up for each particular type of work from various sources, after a check of each bidder for financial responsibility, reputation, etc. (R. 33, 57, 68, 77-78, 86). Except that he could suggest additional names for approval Howard had no control over who was on the list or off it (R. 87). Drawings and specifications for work that effected the structure of the plant would be delivered to Howard and he would send them to each bidder on the list (R. 33, 77-78, 84-88). When the bids were returned Howard would, after the closing date, open them, arrange them in order by price, and attach them to a memo indicating who the low man was (R. 52, 69, 78, 80). This was a routine administrative procedure in which Howard had absolutely no discretion (R. 81, 82, 86, 89). Another department would then review the memo and bids and approve the low bidder (R. 77, 82). A purchase requisition would then be made up, be reviewed by two other Raytheon departments (R. 44-45, 50, 65, 76, 82, 88), and a purchase order executed and further reviewed by yet three other departments, and finally

by the Army (R. 45, 49, 51, 83). At each stage the bidder could be, and sometimes was, rejected (R. 27, 28, 53, 65-67). Final responsibility for the approval of the bid and the award of the work rested with the Raytheon Purchasing Department and then the Army (R. 27-29, 39, 91). If all was in order, the contract awarded, and the work performed, it would be inspected by the Army, who could, even at that stage, refuse payment (R. 85, 90).

In the entire time Howard worked at Raytheon he conformed fully with all regulations and procedures and satisfactorily performed his assignments and responsibilities (R. 89). At no stage in the bidding procedure did he have any discretion regarding the award of subcontracts (R. 89). Sheerest speculation is required to even suggest how, on the evidence, Howard *could* have affected the award of a subcontract, but the Government contended (R. 6-7, 20, 24) and the court below held (R. 131) that this was unnecessary for conviction.

REASONS FOR GRANTING THE WRIT

The court below held that whether Howard intended to induce the award of a Government subcontract[4] and whether he was in a position to do so were not elements of the crime under 41 U.S.C. §§ 51, 54 (R. 133). This Court has yet to interpret the rather unique character of this "Anti-Kickback Statute," but this holding is not only erroneous but in direct conflict with the interpretations of other circuit courts and the clear legislative history of the law itself. In fashioning its holding the court below ruled (R. 131-132) that the statute ". . . should be construed according to the same principles. . . ." as the Federal

[4] At trial the Government dropped any attempt to prove that the alleged "kickbacks" were in "acknowledgement" of the award of subcontracts. Only "inducement" is here involved (R. 6, 20, 24, 117-119).

bribery statute, 18 U.S.C. § 201 (p. 23, *infra*). No other court interpretation of 41 U.S.C. §§ 51, 54 has even cited 18 U.S.C. § 201 much less espoused the analogy, but the court below aborted its own child by ignoring decisions of this Court and other circuit courts that under 18 U.S.C. § 201 the acceptor of the bribe must be proven to have been in a position to affect official action and must specifically intend to do so in order to be convicted. The bribery statute analogy should therefore have aided a proper interpretation of the subject statute; instead it bred further error.

If, despite the misapplication of the bribery analogy, this "Caesar's wife law" invention of the court below is nonetheless a correct interpretation of 41 U.S.C. §§ 51, 54, and petitioner is guilty solely on proof that he received a gift, then 41 U.S.C. §§ 51, 54 violates the due process clause of the Fifth Amendment by shifting an almost impossible burden of proof to a criminal defendant: to prove that it was an innocent gift and an innocent gift *only*. By holding that proof of petitioner's receipt of a gift is proof of the crime the lower court espoused an unconstitutional and unique interpretation of the statute, again in direct conflict with decisions of this Court and other circuit courts. This cannot go uncorrected.

The Court is not here presented, however, with an erroneous and conflicting criminal decision important only to the defendant. Although from the act's inception in 1946 until 1963 there were only two reported prosecutions,[5] there have been three since then,[6] and the Court may judicially notice, *Brown* v. *Board of Education of Topeka, Shawnee*

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[5] *United States* v. *Barnard*, 255 F.2d 583 (10th Cir. 1958), *cert. den.* 358 U.S. 919 (1958) and *Hanis* v. *United States*, 246 F.2d 781 (8th Cir. 1957).

[6] The instant case, *Moore* v. *United States*, ___ F.2d ___ (9th Cir. 1965), No. 19, 435, June 25, 1965, and *United States* v. *Dobar*, 223 F. Supp. 8 (M.D. Fla. 1963).

County, Kansas, 344 U.S. 1 (1952), that there are at the present time in Massachusetts alone several other criminal actions under 41 U.S.C. §§ 51, 54 pending in the federal court. A stepped-up and concerted Government enforcement program appears obvious. The existing conflicts in the cases will therefore spawn more, with concomitant injustice, unless the guidance of this Court is provided. This case provides the opportunity.

The errors are plain.

"The statute does not appear to impose any . . . requirement," said the court below, that the petitioner "be in a position to influence the award of a subcontract" (R. 133).[7] Two of the three other cases (one a circuit court) relevant to this point specifically recognize that any defendant under 41 U.S.C. §§ 51, 54 at *least* has to be in a *position* to induce the award of a subcontract. See, *Hanis* v. *United States*, 246 F. 2d. 781, 784 (8th Cir. 1957); *United States* v. *Dobar*, 223 F. Supp. 8, 11 (M.D. Fla. 1963). The third case, *United States* v. *Moore*, 228 F. Supp. 935 (D.C. S.D. Cal. 1964), was the dictum authority cited by the court below in support of its contrary holding (R. 133). It was reversed after the lower court's opinion on another narrow ground, *Moore* v. *United States*, — F. 2d. —, (9th Cir. 1965), No. 19, 435, June 25, 1965, with a strong concurring and dissenting opinion by Judge Ely which implies his agreement with this petitioner's position, notes the "uncertainty of the law", and states his wish that the court had made this issue the basis of its opinion.

The language of the statute itself demonstrates that the Government must prove a causal connection between the prohibited payment and the award of a subcontract. Section 54 makes criminal the receipt of a "prohibited pay-

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[7] The court did go on to *say*: ". . . we need not decide this issue. . . ." but, of course, it *did* decide the issue by not including it in what it held to be "the essential elements of the crime." (R. 133).

ment" as defined in § 51. As here relevant they are ones made "as an inducement for the award of a subcontract." "Inducement" means to cause or bring about. See, *International Brotherhood of Electrical Workers, etc.* v. *N. L. R. B.*, 341 U.S. 694, 701-705 (1941); *Fromberg, Inc.* v. *Thornhill*, 315 F. 2d 407, 411 (5th Cir. 1963); *Hautan* v. *Kearney & Trecker Corporation*, 179 F. Supp. 490, 492 (E.D. Mich. 1959). Howard must have *done something*. In providing for the civil recovery of the amounts of any "kickbacks" Congress, further on in § 51, speaks of a subcontractor who ". . . granted gifts . . . in connection with the award of a subcontract. . . ." The legislative history is just as clear. The committee report says that the statute intends to penalize gifts from subcontracting concerns given to ". . . individuals employed in purchasing departments of the prime contractors . . . for the purpose of inducing the award of future orders by their influence." *U.S. Code Congressional and Administrative News*, 79th Cong. 2nd Sess., 1946, p. 1082. Clearly the law meant to penalize only gifts *which have resulted in the award of subcontracts*, not, as the court below would have it, every friendly bottle of Christmas "cheer". Its purpose was to punish criminals, not qualify every employee of every government contractor to be the wife of a Caesar.

Even if it were determined, in accordance with the lower court's analogy to the federal bribery statute, that it was unnecessary to prove that Howard in fact induced the award of a subcontract, it was nonetheless a unique misapplication of 18 U.S.C. § 201 to hold that it was even unnecessary to prove that he was in a *position* to do so. To make of 41 U.S.C. §§ 51, 54 a more restrictive edict than 18 U.S.C. § 201, to ignore the obvious differences in public nexus and require of a Raytheon janitor a higher standard of conduct than a federal judge, is not only in direct conflict with all the authorities but an unwarranted *invention*

in criminal law. The current bribery statute (p. 23, *infra*) speaks of a ". . . 'public official' . . . being influenced in his performance of any official act. . . ." The prior versions of the law were the same. 62 Stat. 691 (1948); 35 Stat. 1109 (1909). This Court had no difficulty ruling under this law that the acceptor of the bribe must be shown to be in a position to influence official decisions, *United States* v. *Birdsall*, 233 U.S. 223 (1914), nor did three other circuit courts. *Wilson* v. *United States*, 230 F. 2d 521 (4th Cir. 1956), *cert. denied*, 351 U.S. 931 (1946); *Cohen* v. *United States*, 144 F. 2d 984 (9th Cir. 1944), *cert. denied*, 323 U.S. 797 (1945), *rehearing denied*, 324 U.S. 885 (1945); *Whitney* v. *United States*, 99 F. 2d 327 (10th Cir. 1938). The common law rubric is the same. 3 WHARTON'S CRIMINAL LAW AND PROCEDURE, (Anderson ed. 1957) § 1380-1390. Although the court below quoted (R. 132) from an earlier opinion of its own consistent with these other interpretations of the bribery statute, *Kemler* v. *United States*, 133 F. 2d 235 (1st Cir. 1941), it inexplicably then ignored the holding and, without explanation, here ruled (R. 132) "that the crime of bribery is complete upon the acceptance of a bribe," and, utilizing this erroneous view, analogized that Howard here need not be shown to be in a position to affect the award of subcontracts. This element of the lower court's waywardness not only will spawn further error in subsequent interpretations of 41 U.S.C. §§ 51, 54 but also in subsequent interpretations of 18 U.S.C. § 201. The Court has in the instant case an opportunity to prevent any such distortions in these important areas of criminal law.

The First Circuit's second misinterpretation of the elements of a crime under 41 U.S.C. §§ 51, 54 is even more egregious. The court effectually eliminated the necessity to prove petitioner's intent. The amazing delineation of this error appears twice in the opinion; first, that the ". . . gist of the crime therefore is receipt of a prohibited

payment with knowledge that it is made for the purpose of inducing the award of subcontract," and, second, by quoting the almost identical phrase from a portion of the charge, saying it "correctly specified the nature of the required intent" (R. 131, 133). To hold that the petitioner's required "criminal intent" is only the knowledge that *Champy*, the alleged gift giver, intended to induce the award of a subcontract, not only is in direct conflict with the other Circuits' interpretation of the "Anti-Kickback Statute," but is at variance with the cases under the purportedly analogous bribery statute, and flies in the face of logic. No defendant could even *testify* to what a gift giver intended or didn't intend!

Contrary to the opinion below, the other courts interpreting the statute—except the trial court in *United States* v. *Moore*, 228 F. Supp. 935 (D.C. S.D. Cal. 1964), *rev'd on other grounds, Moore* v. *United States*, — F. 2d — (9th Cir. 1965), No. 19, 435, June 25, 1965—have correctly ruled that the defendant must be shown to have intended to induce the award of a subcontract. The only specific holding, however, is in *Hanis* v. *United States*, 246 F. 2d 781, 787 (8th Cir. 1957):

> ". . . Hanis agreed to accept pay for his influence in directing purchase orders for the benefit of his co-defendants. The requisite criminal intent was present."

The required intent under the bribery statute—the principles of which the court below was ostensibly following—also differs from the standard set up by the lower court here, but *corresponds* with the holdings of the other circuit courts in "Anti-Kickback" cases. The very language of 18 U.S.C. § 201 is difficult to misinterpret: the receipient of the bribe must have the ". . . intent to have his decision or action . . . influenced thereby. . . ." Case interpretation

is the same. *Wilson* v. *United States*, 230 F. 2d 521 (4th Cir. 1956), *cert. denied* 351 U.S. 931 (1956). The common law is equally clear: "... The acceptance of a gift without corrupt prior understanding is not bribery." 3 WHARTON'S CRIMINAL LAW AND PROCEDURE, (Anderson ed. 1957) § 1381. Rather than applying the "principles" of the bribery statute to 41 U.S.C. §§ 51, 54 the lower court recognized them more in the breach than in the observance.

If it were determined, however, that despite the faulty analogy to the bribery statute, the First Circuit is the *only* correct interpreter of 41 U.S.C. §§ 51, 54 and all the other cases wrong—that proof of payment *is* enough to convict—the writ prayed for herein should nonetheless issue. The statute so interpreted would be unconstitutional. It would shift the burden of proof to the defendant in violation of the due process clause of the Fifth Amendment. Faced with this impressed statutory presumption that his receipt of a gift equals guilt a defendant would have the almost impossible task of proving the absence of any culpable motive and that the gift was innocent ("Prove your loyalty."; "Eliminate the appearances of guilt."; "Qualify as the wife of a Caesar!"). But ease or difficulty of proof is immaterial. It is a burden a criminal defendant need never shoulder, as a matter of constitutional law.

The rule cannot be better stated than in this Court's decision in *Tot* v. *United States*, 319 U.S. 463, 470 (1943):

> "... it is not permissible thus to shift the burden by arbitrarily making one fact, which has no relevance to guilt of the offense, the occasion of casting on the defendant the obligation of exculpation."

In reaffirming this precept of constitutional law only a few months ago in *United States* v. *Grainey*, 380 U.S. 63, 65 (1965) the Court focused the standard even more:

> "As the Court of Appeals correctly stated in this case, the constitutionality of the legislation depends upon the rationality of the connection 'between the fact proved and the ultimate fact assumed. . . .'
>
> "The rationality of the inference . . . must be viewed in the context of the broad substantive offense it supports."

There, as here, a simple physical fact subsumed the ultimate fact of guilt: presence at the site of an illegal still in that case, and receipt of a "kickback" here. Petitioner maintains that the fact that the statutory presumption was explicit in *Grainey* and was here found to be implicit by the court below does not blunt the point of constitutional law. And, "in the context of the broad substantive offense" it is here clear that guilt is neither a rational nor relevant inference from the single fact that this employee of a government contractor may have accepted a gift from a subcontractor. See, *Moore* v. *United States,* — F. 2d — (9th Cir. 1965), No. 19, 435, June 25, 1965, Concurring and Dissenting opinion. Howard maybe didn't have the means to pay for the work and materials, or maybe he was a "slow pay", or a "dead beat." And what would be more natural than for him to select as a workman on his own house someone he had seen successfully meet the standards of workmanship under a government contract? If the work was not meant to be paid for maybe it was repayment of an independant debt owed to Howard by the subcontractor, poker losses, or even blackmail! It might equally well have been to secure favors on *other* Raytheon work, which would, of course, be immoral, but not a crime under this statute. *United States* v. *Dobar,* 223 F. Supp. 8 (M.D. Fla. 1965). It might have been for little favors on the job: letting the subcontractor's men leave their tools overnight, a more

convenient parking space, priority on the freight elevator —anything! These purposes are just as likely as "rigging" bids. Note too the unreality of the amounts involved: $4,564.04 is supposed to have induced $600,000 worth of subcontracts (R. 57, 62, 102)! And the subcontractor continued to receive the same volume of subcontracts for at least three years after Howard had left Raytheon (R. 57, 62, 75)!

If 41 U.S.C. §§ 51, 54 means that every employee of a government contractor (who need not know that a government contract is involved, incidentally, *United States* v. *Barnard*, 255 F. 2d 583 (10th Cir. 1958), *cert. denied*, 358 U.S. 919 (1958) has the burden of proving the innocence of every subcontractor's gift, it is an unconstitutional shifting of the burden of proof. *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 (1963). The commission of a crime may not be presumed. *United States* v. *Amedy*, 24 U.S. (11 Wheat.) 392 (1826).[8]

Rather than rely on this last constitutional ground as a reason for the issuance of the writ—valid as it is—petitioner would prefer to cite it in reinforcement of his initial argument that the court below misinterpreted the elements of the crime under 41 U.S.C. §§ 51, 54. Since a statutory interpretation rendering the law unconstitutional is to be avoided when possible, and since the lower court's holding

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[8] An adjunct of this constitutional edict, of course, is the "circumstantial evidence rule": that when the evidence presents only "a choice of possibilities" only one of which is guilt, or where guilt is "nothing more than conjecture" — as is the case here — acquittal is mandatory. The lower court also ignored this precept, apparently accepting the Government's argument that after *Holland* v. *United States*, 348 U.S. 121 (1954) this is no longer the law. Other Circuits differ, *United States* v. *Saunders*, 325 F.2d 840 (6th Cir. 1964); *Kaplan* v. *United States*, 329 F.2d 561 (9th Cir. 1964); *Miller* v. *United States*, 320 F.2d 767 (D.C. Cir. 1963); *Strauss* v. *United States*, 311 F.2d 926 (5th Cir. 1963), and petitioner has reserved (p. 2 *supra*) a further exposition of this error for his brief on the merits.

here works such a result when other Circuits have demonstrated that such a reading is unnecessary, it is further proof that the court erred in fashioning its "Caesar's wife law."

The defendant presumes to remind this Court that the corpus of the criminal law is supposed to be a citizens' consensus of the minimal standards of conduct necessary for the preservation of society. It does not set out the tenets of a religion. It is not the measure of the people's ultimate hopes for themselves. To make it so is to corrupt justice and usurp the tasks of poets and the roles of gods.

The errors are plain and the value of clarification incalculable.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 6315.

ROBERT E. HOWARD,
DEFENDANT, APPELLANT,
v.
UNITED STATES OF AMERICA,
APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before WOODBURY, *Chief Judge*, and HARTIGAN and ALDRICH, *Circuit Judges*.

Daniel F. Featherston, Jr., for appellant.
John Paul Sullivan, Assistant U. S. Attorney, with whom *W. Arthur Garrity, Jr.*, United States Attorney, was on brief, for appellee.

OPINION OF THE COURT.
May 11, 1965.

WOODBURY, *Senior Circuit Judge* (by designation). The appellant and one Bernard J. Champy, of Andover and Methuen, Massachusetts, respectively, were indicted in the court below for violation of the so-called "Anti-Kickback Statute." 60 Stat. 37, 38 (1946), 41 U.S.C. §§ 51, 54 (1958).[1]

[1] 41 U.S.C. § 51 prohibits: "payment of any fee, commission, or compensation of any kind or the granting of any gift or gratuity of any kind, either directly or indirectly, by or on behalf of a subcontractor, as defined in section 52 of this title . . . to any . . . employee, or agent of a prime contractor holding a contract entered into by any department, agency, or establishment of the United States for the furnishing of supplies, materials, equipment or services of any

The indictment alleges and it is not questioned that from June 19 to October 20, 1958, Howard was employed by Raytheon Manufacturing Company as assistant plant manager of its Andover plant where it was producing, or preparing to produce, Hawk Missiles "on a cost reimbursable basis" under a prime contract with the United States, that Howard at the time was in the process of building a home in Andover and that Champy was the general manager of Champy Construction Company, Inc., of Lawrence, Massachusetts, which was a subcontractor as defined in 41 U.S.C. § 52 with respect to the contract between Raytheon and the United States. Count 1 of the indictment charges that on several occasions during the period involved Champy knowingly caused Champy Construction Company to furnish labor and materials to Howard for the construction of his new home as "a fee, commission, gift, gratuity and compensation" paid on behalf of Champy Construction Company "as an inducement for awards of subcontracts and orders" from Raytheon to Champy Construction and "as an acknowledgement of subcontracts and awards previously awarded." Count 2 in like terms charges Howard with knowingly receiving labor and materials for his new home from Champy Construction Company for the prohibited purpose.

Howard and Champy were found guilty by a jury and sentenced. Howard appealed.

Appellant's principal contention is that the trial court misinterpreted the "Anti-Kickback Statute" by regarding it as a "Caesar's wife law." By this appellant means that the trial court allowed conviction on the mere appearance

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kind whatsoever, on a cost-plus-a-fixed-fee or other cost reimbursable basis. . . ."

Section 54, *id.*, provides: "Any person who shall knowingly, directly or indirectly, make or receive any such prohibited payment shall be fined not more than $10,000 or be imprisoned for not more than two years, or both."

of guilt whereas it should have required a showing of specific criminal intent. From this premise he argues that the indictment fails to charge a crime, that the charge to the jury was incorrect, and that there was insufficient evidence to support the verdict. Wherefore he contends that his motions for a new trial and for acquittal were erroneously denied and that at least he should have a new trial.

In accordance with his theory of the case, the appellant first argues that an essential element of the crime as defined by the statute is the existence of a "connection" between the acceptance of a prohibited payment and the award of certain subcontracts. We do not agree.

Section 54 makes it a crime for any person to "knowingly, directly or indirectly, make or receive any such prohibited payment . . . ," and § 51 defines the prohibited payment, insofar as relevant to this case, as a fee or gift which is paid or granted "as an inducement for the award of a subcontract. . . ." The gist of the crime therefore is receipt of a prohibited payment with knowledge that it is made for the purpose of inducing the award of a subcontract. Whether the recipient actually induces the award of a subcontract is irrelevant. The statute forbids the purchase of good will in the contracting process.

Appellant's interpretation of the statute as requiring a "connection" between a prohibited payment and the improper awarding of subcontracts is based on too narrow a view of the vice the statute was designed to correct. This vice is not only the improper awarding of subcontracts but also the corruption of the judgment of officers, employees or agents of prime contractors who are in some manner participating in the awarding of subcontracts involving the use of government funds.

We think, therefore, that the purpose of the "Anti-Kickback Statute" is basically the same as that of the bribery statute, 18 U.S.C. § 201, and should be construed

according to the same principles. And it has been long established that the crime of bribery is complete upon the acceptance of a bribe regardless of whether or not improper action is thereafter taken.[2] *Wilson* v. *United States*, 230 F.2d 521, 526 (C.A. 4, 1956), *cert. denied*, 351 U.S. 931 (1956); *Whitney* v. *United States*, 99 F.2d 327, 330 (C.A. 10, 1938), and cases cited therein. What this Court said in regard to the giving of a bribe in *Kemler* v. *United States*, 133 F.2d 235, 238 (1941), also applies to the acceptance of a kickback:

> "The clear purpose of the statute is to protect the public from the evil consequences of corruption in the public service. Thus the gravamen of the offense described therein is the giving or offering of a bribe to a person acting on behalf of the United States for the purpose of influencing official conduct. Obviously no one would give or offer a bribe unless he expected to gain some advantage thereby, and since attempting to gain an advantage by this means is the evil which the statute is designed to prevent, it can make no difference if after the act is done the doer discovers that for some reason or another, be it a mistake on his part or a mistake on the part of some officer or agency of the United States, there was actually no occasion for him to have done it."

It follows that appellant's further contention that the statute requires a showing of a specific criminal intent to induce or influence the award of particular subcontracts must also be rejected.

However, this does not mean that criminal intent is

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[2] Appellant's argument recalls Lord Bacon's defense to a charge of bribery, namely that he could not be guilty because he took from both sides and that therefore his subsequent decision would not be improper.

not an essential element of the offense or that conviction on the mere appearance of guilt would be proper. *Morissette* v. *United States*, 342 U.S. 246 (1952), cautions against interpreting criminal statutes to produce such a result.

The trial court did not construe the statute as imposing absolute criminal liability. It charged the jury that "Intent is involved in this case. That may be proved beyond a reasonable doubt by circumstantial evidence." Furthermore the trial court correctly specified the nature of the required intent when it charged the jury that "the government must satisfy you beyond a reasonable doubt . . . that Howard accepted the work and materials knowing that the work and materials were furnished for his home as an inducement for the award of some subcontract or orders under Contract 4030."

In sum we think the essential elements of the crime defined by § 54 are that the parties be within the class covered by the statute, admittedly they are, a contract covered by the statute, as there admittedly is here, and an acceptance of a prohibited payment as defined in § 51 with knowledge of its nature and purpose.[3]

The remaining question is the sufficiency of the evidence to support a verdict of guilty of a crime containing the elements set out above. Appellant contends there was insufficient evidence that a prohibited payment was made or accepted with knowledge of its nature and purpose.

The suggestion that there was no evidence from which the jury could find the work and materials provided to Howard constituted a prohibited payment or kickback is

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[3] Appellant would add that the recipient be in a position to influence the award of a subcontract. The statute does not appear to impose any such requirement. See *United States* v. *Moore*, 228 F.Supp. 935, 937 (D.C.S.D. Cal., 1964). But we need not decide this question for here the jury could find appellant was in a position to affect the award of subcontracts by informing Champy of the low bid and inviting him to bid below the lowest figure.

without merit. The jury was entitled to infer from the way Champy carried the account on his books as an account payable rather than an account receivable, from Champy's feeble and belated attempts to collect, and from the surrounding circumstances, that Champy intended to confer a benefit on Howard in return for favorable consideration in the Raytheon bidding process.

Likewise we think the jury was entitled to infer that appellant accepted the work and materials with knowledge of the purpose for which they were offered. The fact remains that Howard did not pay for the benefits obtained from Champy although he had received a substantial mortgage payment to use for costs incurred in building his home at the same time the benefits were conferred. And the jury could find that Howard was aware of Champy's feeble attempts to collect and drew the appropriate conclusion therefrom. In few areas is the admonition to give proper deference to the jury's findings of fact more compelling than in the necessarily subjective area of intent. See *Hoyer* v. *United States,* 223 F.2d 134, 139 (C.A. 8, 1955); *Jackson* v. *United States,* 330 F.2d 679, 681 (C.A. 8, 1964), *cert. denied,* 379 U.S. 855.

We have considered the other points raised by appellant but find nothing meriting discussion.

Judgment will be entered affirming the judgment of the District Court.

APPENDIX B

41 U.S.C. §51.

"§51. Fees or kick-backs by subcontractors on cost plus-a-fixed-fee or cost reimbursable contracts; recovery by United States; conclusive presumptions; withholding of payments.

"The payment of any fee, commission, or compensation of any kind or the granting of any gift or gratuity of any kind, either directly or indirectly, by or on behalf of a subcontractor, as defined in section 52 of this title, (1) to any officer, partner, employees, or agent of a prime contractor holding a contract entered into by any department, agency, or establishment of the United States for the furnishing of supplies, materials, equipment or services of any kind whatsoever, on a cost-plus-a-fixed-fee or other cost reimbursable basis; or to any such prime contractor or (2) to any officer, partner, employee, or agent of a higher tier subcontractor holding a subcontract under the prime contract, or to any such subcontractor either as an inducement for the award of a subcontract or order from the prime contractor or any subcontractor, or as an acknowledgment of a subcontract or order previously awarded, is prohibited. The amount of any such fee, commission, or compensation or the cost or expense of any such gratuity or gift, whether heretofore or hereafter paid or incurred by the subcontractor, shall not be charged, either directly or indirectly, as a part of the contract price charged by the subcontractor to the prime contractor or higher tier subcontractor. The amount of any such fee, cost or expense shall be recoverable on behalf of the United States from the subcontractor or the recipient thereof by set-off of moneys otherwise owing to the subcontractor either directly by the United States, or by a prime contractor under any cost-plus-a-fixed-fee or

cost reimbursable contract, or by an action in an appropriate court of the United States. Upon a showing that a subcontractor paid fees, commissions, or compensation or granted gifts or gratuities to an officer, partner, employee, or agent of a prime contractor or of another higher tier subcontractor, in connection with the award of a subcontract or order thereunder, it shall be conclusively presumed that the cost of such expense was included in the price of the subcontract or order and ultimately borne by the United States. Upon the direction of the contracting department or agency or of the General Accounting Office, the prime contractor shall withhold from sums otherwise due a subcontractor any amount reported to have been found to have been paid by a subcontractor as a fee, commission, or compensation or as a gift or gratuity to an officer, partner, employee, or agent of the prime contractor or another higher tier subcontractor. Mar. 8, 1946, c. 80, §1, 60 Stat. 37."

41 U.S.C. §54.

"§54. Same; penalties.

"Any person who shall knowingly, directly or indirectly, make or receive any such prohibited payment shall be fined not more than $10,000 or be imprisoned for not more than two years, or both. Mar. 8, 1946, c. 80, §4, 60 Stat. 38."

18 U.S.C. §201.

§201. Bribery of public officials and witnesses

(a) For the purpose of this section:

"public official" means Member of Congress, or Resident Commissioner, either before or after he has qualified, or an officer or employee or person acting

for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government or a juror; and

"person who has been selected to be a public official" means any person who has been nominated or appointed to be a public official, or has been officially informed that he will be so nominated or appointed; and

"official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official in his official capacity, or in his place of trust or profit.

(b) Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—

(1) to influence any official act; or

(2) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(3) to induce such public official or such person who has been selected to be a public official to do or omit to do anything in violation of his lawful duty, or

(c) Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees

to receive anything of value for himself or for any other person or entity, in return for:

(1) being influenced in his performance of any official act; or

(2) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(3) being induced to do or omit to do any act in violation of his official duty; or

(d) Whoever, directly or indirectly corruptly gives, offers, or promises anything of value to any person, or promises such person to give anything of value to any other person or entity, with intent to influence the testimony under oath or affirmation of such first-mentioned person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony or with intent to influence such person to absent himself therefrom; or

(e) Whoever, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity in return for being influenced in his testimony under oath or affirmation as a witness upon any such trial, hearing, or other proceeding, or in return for absenting himself therefrom—

Shall be fined not more than $20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

(f) Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official; or

(g) Whoever, being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him; or

(h) Whoever, directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or for or because of his absence therefrom; or

(i) Whoever, directly or indirectly, asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of the testimony under oath or affirmation given or to be given by him as a witness upon any such trial, hearing, or other proceeding, or for or because of his absence therefrom—

Shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

(j) Subsections (d), (e), (h), and (i) shall not be construed to prohibit the payment or receipt of witness fees provided by law, or the payment, by the party upon whose behalf a witness is called and receipt by a witness, of the

reasonable cost of travel and subsistence incurred and the reasonable value of time lost in attendance at any such trial, hearing, or proceeding, or, in the case of expert witnesses, involving a technical or professional opinion, a reasonable fee for time spent in the preparation of such opinion, and in appearing and testifying.

(k) The offenses and penalties prescribed in this section are separate from and in addition to those prescribed in sections 1503, 1504, and 1505 of this title. Added Pub. L. 87-849, § 1(a), Oct. 23, 1962, 76 Stat. 1119.

Fifth Amendment to the Constitution of the United States

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 378

ROBERT E. HOWARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 16-21) is reported at 345 F.2d 126.

JURISDICTION

The judgment of the court of appeals was entered on May 11, 1965. A timely petition for rehearing was denied on June 24, 1965. The petition for a writ of certiorari was filed on July 21, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether it is an element of the offense under 41 U.S.C. 51, 54, making it a crime for an employee of a prime government contractor to accept a "kickback" gratuity from a subcontractor, that the employee actually intended to influence the award of a subcontract.

STATUTE INVOLVED

At the time of the charged offense, 41 U.S.C. 51 provided in pertinent part:

> The payment of any fee, commission, or compensation of any kind or the granting of any gift or gratuity of any kind, either directly or indirectly, by or on behalf of a subcontractor, as defined in section 52 of this title, (1) to any officer, partner, employee, or agent of a prime contractor holding a contract entered into by any department, agency, or establishment of the United States for the furnishing of supplies, materials, equipment or services of any kind whatsoever, on a cost-plus-a-fixed-fee or other cost reimbursable basis; or to any such prime contractor or (2) to any officer, partner, employee, or agent of a higher tier subcontractor holding a subcontract under the prime contract, or to any such subcontractor either as an inducement for the award of a subcontract or order from the prime contractor or any subcontractor, or as an acknowledgment of a subcontract or order previously awarded, is prohibited. * * *

41 U.S.C. 54 provides:

> Any person who shall knowingly, directly or indirectly, make or receive any such prohibited

payment shall be fined not more than $10,000 or be imprisoned for not more than two years, or both.

STATEMENT

Petitioner was convicted by a jury, in the United States District Court for the District of Massachusetts, under an indictment charging that, while an employee of a company holding a cost-reimbursable government contract, he accepted gifts from a subcontractor in violation of 41 U.S.C. 51.[1] He was sentenced to imprisonment for six months (R. 12). The court of appeals unanimously affirmed the conviction.

In 1956 the United States Army entered into a long-term contract with the Raytheon Manufacturing Company for the production of Hawk missiles (R. 25-27). The terms of the contract provided that the Army would reimburse Raytheon for all costs incurred in the performance of the contract, including amounts paid to subcontractors for plant renovation and construction (R. 25-27, 37).

Subcontracts for plant renovation and construction were awarded by Raytheon on the basis of recommendations submitted by its plant engineering department (R. 39, 68, 77), of which petitioner was the assistant head (R. 68, 75-76). The department drew plans and

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[1] The general manager of the subcontractor, Bernard J. Champy, was charged in the same indictment with giving petitioner the described gratuities. He was tried and convicted jointly with petitioner and was sentenced to imprisonment for one year (suspended), probation for two years, and a fine of $1,500 (R. 2-4).

specifications and then invited written bids from construction firms whose names appeared on a list of responsible companies (R. 33, 48, 77).[2] The Champy Construction Company was among these listed firms. All written bids were addressed to petitioner (R. 46, 51, 63, 78, 97-98), were received by him without being stamped with the date of receipt (R. 46, 78), and were opened by him.

At the expiration of the time for submission of bids, petitioner prepared a memorandum recommending a company for the award. Petitioner usually recommended the low bidder (R. 68, 77, 81-82). Petitioner's memorandum and the written bids were processed by the Raytheon purchasing department, and in almost all cases the company recommended by petitioner would be awarded the subcontract (R. 35-36, 39-40, 77-78, 82). Petitioner's recommendation was the factor which "carried the most weight" in the awarding of such subcontracts (R. 68, 69-70).[3] According to the testimony of the head of the Raytheon engineering department, this procedure would have permitted a person in petitioner's position to inform a favored construction firm of the lowest bid submitted, in order that the favored firm might then submit one slightly lower (R. 93).

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[2] Petitioner had the power to recommend that a company be placed on the list of prospective bidders and, unless the company were found to have a poor credit rating, it would be placed on the list (R. 87).

[3] Subcontracts for amounts under $1,000 were solicited and awarded to the lowest bidder by telephone (R. 47-48).

In 1958, when it was forseeable that numerous Raytheon subcontracts for plant renovation and construction would be necessary (R. 43-44), petitioner was having a new home constructed. On June 19, 1958, the Champy Construction Company began furnishing labor, equipment, and materials for the house (R. 99). On June 25, Champy received its first subcontract from Raytheon (R. 97). Thereafter Champy furnished over $4,500 worth of services and materials for petitioner's house (R. 99-100) and was awarded several additional subcontracts by Raytheon (R. 43, 57, 97). Petitioner never paid Champy anything for the work on his house (R. 100), despite the fact that he had obtained a $20,000 construction loan (R. 94-95). During the period that the house was being built, Champy sent petitioner itemized lists of the value of the work performed in each preceding month (R. 13-19, 101-102), but it did not carry these totals in its accounts receivable ledger (R. 102). It never sought payment from petitioner until four years later, after the F.B.I. had begun interviewing Champy officers concerning the case (R. 100, 101, 105).

The court instructed the jury, *inter alia*, that, in order to convict, it must find that (R. 118-120):

> * * * Howard was an employee or agent of Raytheon who played a part in the administrative processes by which Raytheon awarded subcontracts under [the prime contract];
>
> * * * *
>
> * * * [T]he labor or materials were furnished on behalf of the Champy Construction Company

with the understanding that Howard need not pay for them and that the work and materials would be in effect a gift for the purpose of inducing Howard to effect the award of the subcontracts to the Champy Construction Company;

* * * *

Howard accepted the work and materials knowing that the work and materials were furnished for his home as an inducement for the award of some subcontracts or orders under [the prime contract].

ARGUMENT

The statute at issue covers any employee of a prime government contractor "who shall knowingly * * * receive" (41 U.S.C. 54) a gratuity "as an inducement for the award of a subcontract" (41 U.S.C. 51). Here the jury, under appropriate instructions, found that petitioner "accepted the work and materials knowing that the work and materials were furnished for his home as an inducement for the award of some subcontracts" (R. 119) and that he "received [them] as an inducement" (R. 120). Petitioner argues that his conviction should, nevertheless, be reversed because the jury was not required to find in addition that, at the time petitioner took the benefit, he actually intended to have his conduct influenced.

The statute, however, clearly supports the ruling below that it was enough that petitioner, in accepting the payment, knew that it was made with an intention to induce the award of the contract. The statute merely requires that the payment be made "as

an inducement for the award of a subcontract." The purpose of the legislation was to prevent commercial bribery where the cost of the gratuity could ultimately be charged to the United States. H. Rep. No. 212, S. Rep. No. 177, 79th Cong., 1st Sess. Whether an employee receiving a "kickback" from a prospective subcontractor actually intends to influence the award of a subcontract or whether he merely intends to defraud the subcontractor by doing nothing, the payment is for the prohibited purpose, the costs of the subcontractor rise, and this amount will presumably be reflected in the bid. The construction given the statute below is thus fully in accord with its language and purpose, and there are no decisions to the contrary.[4]

Petitioner erroneously argues (Pet. 8-10) that the court of appeals held that he need not have been in a position to influence the awarding of subcontracts. The court stated that it was unnecessary to reach that question, noting that the evidence was sufficient to support the jury's finding that he was in such a position (Pet. 20, n. 3). The trial court had specifically

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[4] In reasoning that petitioner need not actually have induced the award of a contract, the court of appeals drew an analogy between 41 U.S.C. 51 and the bribery statute, 18 U.S.C. 201 (Pet. 18-19). Petitioner's extension of the analogy to the question of intent (Pet. 7, 11-12) is unwarranted, since the bribery statute explicitly requires that the recipient of the gratuity intend to have his action influenced. The fact that the present statute is not so worded reflects the judgment that, contrary to the bribery statute, proof that the recipient intended to be influenced should not be required under 41 U.S.C. 51 and 54.

instructed that the statute was directed against an employee "who is in a position to effect the award of contracts" (R. 119), and that the jury must find that petitioner "played a part in the administrative processes by which Raytheon awarded subcontracts" (R. 118).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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UNITED STATES OF AMERICA,
RESPONDENT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The Brief For the United States In Opposition necessitates a few clarifications.

In order to argue that the lower court was correct in eliminating petitioner's intent as an element in the crime the respondent's brief

1. interprets 41 U.S.C. §§ 51, 54 as defining a crime which 'even the conflicting array of cases has yet devined,
2. miscites the legislative history of the statute, and
3. ignores case law (presumably so as not to admit the obvious conflict in Circuits which exists).

The respondent notes on page 7 of its brief:

> ". . . Whether an employee receiving a 'kickback' from a prospective subcontractor actually intends to influence the award of a subcontract or whether he merely intends to defraud the subcontractor by doing nothing, the payment is for the prohibited purpose. . . ."

The United States thereby admits that the employee must intend *something* to commit a crime under a constitutional interpretation of this statute. As the petition details (Pet. 10-12), the First Circuit opinion herein held to the contrary, but not even the lower court read into 41 U.S.C. §§ 51, 54 the purpose to protect government subcontractors by making it just as criminal to accept their "kickbacks" and then "doing nothing" as to induce the award of subcontracts as the *quid pro quo!* Such a legislative purpose would be absurd, and the Government, of course, cites no authority for its contrivance. The idea, however, further dramatizes petitioner's argument that the statute requires definitive interpretation by this Court to eliminate the "Caesar's wife law" connotations with which it has been impressed.

The "prohibited payment" of § 54 is one made "as an inducement for the award of a subcontract," as defined in § 51. The legislative history makes even clearer the meaning of the words. The legislative intent was to reach "individuals employed in the purchasing departments of the prime contractors" who receive the prohibited payments "for the purpose of inducing the award of future orders by their influence." *U.S. Code Congressional and Administrative News,* 79th Cong. 2nd Sess., 1946, p. 1082. The employee must intend to induce the award of a subcontract for his acceptance of a gratuity to be a crime. No-

where is there any hint that Congress also meant to prevent the bilking of subcontractors who have paid a bona fide "kickback" by an employee's subsequent inaction! The clear facts are to the contrary. Section 54 makes the payment by the subcontractor criminal and § 51 authorizes suit against the subcontractor by the United States to recover the amount of any "kickback."

The respondent also contends (Br. 7) that there are "no decisions. . .. contrary" to its unique delineation of the crime. In fact, as detailed in the petition on page 11, the Eighth Circuit has specifically held that *petitioner's* contention is correct: a defendant must intend to induce the award of a subcontract. In its conflicting holding here the First Circuit did not even cite the Eighth Circuit case, *Hanis* v. *United States,* 246 F. 2d 781 (8th Cir. 1957).

The respondent terms (Br. 7, n. 4) the argument in the petition (Pet. 7, 11-12) that the lower court's analogy to the bribery statute, 18 U.S.C. § 201, was faulty on the issue of the required intent as being "Petitioner's extension of the analogy. . . ." The Government then recognizes that the statutes are not analogous. A reading of the opinion below (Pet. 18-19) makes it clear that the First Circuit, however, considered its bribery analogy complete, including the issue of intent, but petitioner is content to point out that the Government thereby admits another of his arguments is correct: the bribery statute supports the petitioner on the issue of intent and is *not* an authority for the erroneous opinion below.

The respondent then, of course, logically must argue, as it does (Br. 7, n. 4), that in making 41 U.S.C. §§ 51, 54 far more restrictive (by *its* reading) than 18 U.S.C. § 201 Congress *intended* to require of a Raytheon janitor a higher standard of conduct than a federal judge. That posture, having no foundation, of course, falls of itself.

If the Government's argument and the opinion below are correct, however, and an employee need have no criminal intent (or as the Government prefers: can intend to induce or to defraud the subcontractor by *not* inducing!), that receipt of the gratuity *alone* equals guilt, what of petitioner's second question presented (Pet. 3)? The petition argued (Pet. 12-15) that the statute as so interpreted would be an unconstitutional shifting of the burden of proof to a criminal defendant. Respondent makes no answer to this point, preferring to say that there is but one "Question Presented" (Br. 2). This vital constitutional question is of itself reason to grant the writ, and the brief in opposition does not argue otherwise.

Respectfully submitted,

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